IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

TUESDAY, THE 25TH SEPTEMBER 2007 / 3RD ASWINA 1929

RSA.No. 682 of 2007()

AS.16/2002 of I ADDL. DISTRICT COURT, PALAKKAD
OS.422/1999 of MUNSIFF COURT, CHITTUR

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APPELLANTS/APPELLANTS/PLAINTIFFS

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1. CHAMIAR, S/O. KESAVAN,
   RESIDING AT THANCHANKODE KALAM, PUDUNAGARAM,
   CHITTUR, PALGHAT.

2. JAYADEVAN, S/O. CHAMIAR,
   OF -DO-

BY ADV. SRI.V.G.ARUN
SRI.T.R.HARIKUMAR

RESPONDENTS: RESPONDENTS/DEFENDANTS

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1. STATE OF KERALA, REPRESENTED BY
   THE DISTRICT COLLECTOR, CIVIL STATION,
   PALAKKAD.

2. THE SUPERINTENDING ENGINEER,
   BUILDING AND LOCAL WORKS, NORTH CIRCLE,
   KANJIKKODE, PALGHAT.

3. THE ASSISTANT EXECUTIVE ENGINEER,
   P.W.D. BUILDING, SUB DIVISION, CHITTUR,
   (PUDUNAGARAM).

4. B.P.MADHAVAN,
   PANAYAKKAL, KANJIKKODE, PALGHAT.

BY

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 25/09/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

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R.S.A. NO. 682 OF 2007

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Dated this the 25th day of September, 2007

JUDGMENT

Plaintiffs in O.S.422/1999 on the file of Munsiff Court, Chittur are the appellants. Respondents are the defendants. Appellants instituted the suit seeking a decree for a declaration of the right of way by easement of prescription over plaint B schedule property and for a permanent prohibitory injunction. Plaint A schedule property admittedly belong to first appellant under Ext.A1 partition deed dated 9.7.1952. Case of the appellants was that plaint B schedule property is a cart track which is vested with the respondents Government and through the plaint B schedule property they are entering into plaint A schedule property and for the last 80 years they have been enjoying the B schedule cart-track without any interruption as an easement and as of right and openly and peaceably and thereby

they have prescribed right of easement over that property and P.W.D authorities now started to construct a compound wall obstructing the pathway and they have no right to do so and therefore appellants are entitled to a decree for a declartion of right of easement and permanent prohibitory injunction. Respondents in the written statement contended that there is no B schedule cart-track which is used by appellants for the last 80 years to reach plaint A schedule property as claimed and they have a panchayat road to reach plaint A schedule property and existence of the Panchayat road was suppressed in the plaint and the workshop now in existence in the plaint A schedule is a recent one and they have no right of way by easement over plaint B schedule property and therefore the suit is to be dismissed.

2. Learned Munsiff on the evidence of Pws.1 to 3 and Exts.A1 to A5, CW1 and Exts.C1 and C2 dismissed the suit holding that appellants did not establish a right of easement by prescription.

Appellants challenged the decree and judgment before District Court, Palakkad in A.S.16/2002. Learned Additional District Judge on reappreciation of evidence found that existence of the way is established by the evidence of Pws.1 to 3 and Exts.C1 and C2.Learned Additional District Judge also found that the said way has been used by appellants openly and peaceably for more than the requisite period as of right and as an easement and therefore they have prescribed a right of way by easement of prescription. But it was further found that there is no evidence to prove that plaint B schedule property as such was being used as a way and evidence of Pws.1 to 3 do not establish that a cartable road was being used by appellants for the requisite period. It was therefore found that appellants are only entitled to a right of way having a width of 5 feet. A decree declaring the right of way over a portion of plaint B schedule property having a length of 23 metres and width of 5 feet on the western side of

plaint B schedule property was passed. Respondents are restrained from interfering with that right of way. Respondents did not challenge the decree granted by the first appellate court. Only plaintiffs filed the second appeal challenging the findings of first appellate court. It was contended that appellants are entitled to get a right of way over the entire width to plaint B schedule property and restricting the width to 5 feet is unsustainable. The learned counsel argued that having found that appellants have a right of way by easement of prescription over plaint B schedule property as they have been using plaint B schedule property as a way for more than the requisite period, there was no justification for reducing the width of the way to 5 feet. It was argued that evidence establish that plaint B schedule as such is being used and therefore the right of easement over the entire plaint B schedule property should have been granted.

3. On hearing the learned counsel, I do not

find any substantial question of law involved in the appeal.

3. Plaint B schedule property is admittedly a portion of the Government land which lies to the west of plaint A schedule property. Plaint B schedule property is having a length of 23 metres and width of 6 metres. First appellate court on appreciating the evidence found that appellants have prescribed as right of way, as it was proved that they have been using a way to reach plaint A schedule property through the western Government land for the last several years and that too for more than the requisite period and it is as of right and as an easement openly and peaceably and therefore appellants have prescribed a right of way by easement of prescription. But on the evidence it was also found that appellants are only entitled to get a right of way only over the way which was available to them when they commenced using the property as a way. On the evidence it was found that appellants did not establish that they have

been using a cartable road through Government land to reach plaint A schedule property. There is no case that the appellants had any vehicle prior to the starting of a motor workshop in the plaint A schedule property. Ext.A5 licence shows that it was started only in 2000. Though Pws.2 and 3 were examined and they deposed that plaint B schedule property has been used as a way to reach plaint A schedule property, as found by first appellate court, they did not depose that plaint B schedule property was being used for vehicular traffic, to reach plaint A schedule property. Though PW1 deposed that plaint B schedule property is being used, there is no specific case in the plaint that tractor was being used from any particular period. In the absence of positive evidence, and on the failure to prove that appellants have been using plaint B schedule property to take vehicle to plaint A schedule property it cannot be said that they have prescribed a right of way over the entire width of plaint B schedule property. It is for

that reason first appellate court restricted the right of way to a width of 5 feet. On the evidence on record, that finding cannot be interfered. As no substantial question of law involved in the appeal, it is dismissed in limine.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006